private property everywhere. The precedent is likely to be exploited in the future.[15]

E. M. B.

PRESENT DAY LABOR LITIGATION

It is believed that the previous comments,[1] which have attempted a somewhat hasty review of existing labor litigation, make obvious the conclusion that economic and political questions are unavoidedly interwoven with the legal problems. It is seldom, perhaps, that the courts professedly choose to become involved in economic discussions; they consider their duty to be the interpretation and enforcement of existing law. In labor disputes, however, the legal rules that they formulate must be based upon social and economic policy. The people, as a whole, desire and intend the establishment of an industrial system truly in accord with democratic principles. The common interest requires the stabilization of our industrial field, and most of this task has been left to the courts.

It is essential first to consider the adequacy of our present laws and to determine whether there is need for any revision. Ever since the first group of employees banded together, we have had a series of concessions to the labor groups. At the present time there is much conflict and friction over minor points, such as picketing, which will not be discussed, except to suggest that some reform is possible. The matters now chiefly in dispute, however, are generally conceded to be the use of the injunction and the extension of the boycott.

The use of the injunction in labor disputes may be limited; but it is submitted that where irreparable injury is threatened, it is sound policy for the law to grant preventive relief, and the unions may have considerable difficulty in showing why they as a class should be exempt.[2]

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[15] See COMMENTS (1921) 30 YALE LAW JOURNAL, 845 and F. E. Farrer, *The Forfeiture of Enemy Private Property* (1921) 37 L. QUART. REV. 218, 337.

[1] COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 404, 501, 618, 736.

[2] Mr. Frank Morrison, Secretary of the Amer. Fed. of Labor, states the labor view as follows: "The injunction has become a favorite weapon of anti-union employers in their attacks on organized labor. This writ, as developed and applied up to within a comparatively few years ago, was for the protection of property and property rights and did not apply to personal relations. To bring labor within its scope, a theory has been evolved that the employer has a right in the labor of his employees and that he also has a right in the patronage of the public, which can be protected by the injunction process if workers attempt to divert it to other channels. Workers insist that their right to labor is a personal right, and that the patronage of themselves or their sympathizers is in the same category. If the right to labor, or to refuse to labor, or to ask others to refuse to labor has any element of property rights, the worker is not a free man. The labor injunctions could be easily understood but for the economic and unethical theory that labor power is a commodity." (March 10, 1921) YALE DAILY NEWS.

If there is to be a change in this matter, it is suggested that collective responsibility on the part of the employees is absolutely necessary in order to safeguard the rights of others.[3]

The main objective for which the employees are fighting at the moment, however, is the extension of the boycott. They maintain that A should have the legal privilege to strike against B to compel B to cease dealing with D (who conducts an open shop). Were it not for the origin of labor law, it is doubtful whether A could be restrained. Historical reasons aside, it may well be argued that there is no sound basis for declaring this to be a tort. True it injures the other party—B in the supposed case—as well as the parties who are more directly involved in the quarrel; but we must realize that our fundamental law does not necessarily give relief in such cases. The good of the many may justify harm to the few; and it is only where the circumstances are deemed insufficient to justify such conduct that the conduct is tortious. Thus A should be enjoined only if his conduct cannot be socially justified as a legitimate act in protection of his own interest. When A strikes in the manner just mentioned, who can say that he is not seeking, though perhaps indirectly, his own economic advantage? He is certainly striving to advance the cause of unionism upon which he deems his self interest dependent.[4] Certainly the employee must himself believe that the question is material to his interest, since he is willing to face loss of wages and even starvation to gain this end.

The rules of law governing this relation between employee and employer are after all mostly rules of warfare; they do not aim to make a disturbance impossible, but seek to regulate it once it is started. And until they are equalized, they are unjust even as such. Is there any sound reason in logic or fairness why we should say that A may not strike against B to compel him to cease dealing with D (employer of non-union workmen), and yet that D, the employer, may refuse to sell to B because he operates a closed shop?[5] Is it equitable to allow D to strike at A through B, and yet not allow A to retaliate in kind? This seems a serious divergence for any system of law, and some equalization is desirable. Some courts have realized this and consequently the secondary boycott is permitted in several states,[6] and there is an inclina-

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[3] Cf. Mass. Statute recently enacted, which makes labor unions answerable in damages. Act of May 9, 1921, Laws, 1921, ch. 368.

[4] See the dissenting opinion of Judge Holmes in *Vegelahn v. Guntner* (1896) 167 Mass. 92, 104, 44 N. E. 1077, 1079.

[5] As was brought out in the investigation of the United States Steel Corporation, as published in the papers during January, 1921. Cf. also *Cote v. Murphy* (1894) 159 Pa. 420, 28 Atl. 190.

[6] *Pierce v. Stablemen's Union* (1909) 156 Calif. 70, 103 Pac. 324; *Meier v. Speer* (1910) 96 Ark. 618, 132 S. W. 988.

tion in that direction in other states.[7] Equalization of the means of enforcement is also necessary so that they may be applied to labor as well as to capital.

What would be the result, however, if this rule were carried to its logical conclusion? Practically all strikes would be allowed, and we should soon be very likely to see a combined workmen's union, or at least several strong groups, with their leaders controlling the industrial situation. It is this prospect, doubtless, that has influenced the courts to make concessions to labor with reluctance. That this is a real danger goes without saying. It may be that anti-trust laws, or laws of like character, could regulate the situation; it may be that other solutions will be forthcoming.

The struggle of the employee rests essentially on an economic basis and therefore it is necessary to understand clearly the objects for which he is striving, i. e. (1) better working conditions, and (2) increased economic reward. The former has been procured to a great extent as a result of workmen's compensation acts, child labor laws, shorter work day, etc. Public conscience has been awakened and reforms along this line are doubtless of lasting duration. The second point, however, presents serious difficulty. It is a platitude to assert that the employee must receive a fair return for his labor, but it is extremely difficult to determine what this shall be or how it shall be obtained. The employee contends that he produces wealth, yet gets but a small portion of it in return. His natural effort, then, is to seek a higher wage, which to him represents a greater economic reward. His contention is true to a certain extent, perhaps, but essentially the mere attainment of his object is not a cure, for it puts into operation the vicious circle of higher prices. Increased wages alone cannot be the solution, although the changing value of the dollar and other causes may help along this illusion.

There are two fundamental points involved in any sound industrial life. There must be ((1) a fair distribution cost; (2) a fair return to the employer for his capital or skill. But little attention has been paid to the former. Present costs of distribution, that is the increase of the consumer's price over the manufacturer's price, average from twenty-five to one hundred per cent.[8] The determination of a fair

[7] This is true of such states as New York where union employees are permitted to refuse to work on non-union materials, which is certainly one form of a secondary boycott. See *Bossert v. Dhuy* (1917) 221 N. Y. 342, 117 N. E. 582.

[8] Economists constantly deplore this enormous expense and suggest that centralized municipal-owned or regulated stores would solve the problem. From an economic viewpoint it is evident that the consequent reduction in rentals, labor, stocks, etc., would effect a material saving. The merits of this contention will not be discussed except to point out that our present system is extremely wasteful, and any reduction in this distribution cost will directly affect the reward of the employee, by raising the purchasing power of his dollar.

rate to the employer presents still greater difficulties. Undoubtedly there will be an increased agitation for governmental regulation,[9] and particularly so in regard to price fixing. Possibly it will be along the lines of the Lever Act.[10] Some would go considerably farther than this and urge that the government take entire charge of industrial conflicts. This is the development expressed in the Kansas Industrial Court, which is claimed to be eminently successful.[11] If the state decides to take over these matters, and thus to abolish strikes and other labor troubles, it must be prepared to decide these disputes on an economic basis and to effect a fair return to all parties. If the unions are to be deprived of their privilege of striking, the state must be ready to guarantee the economic justice for which the employee is striving. It is doubtful whether this country is ready to take this step. Thus far it has refrained from interfering to such a great extent in economic questions, and there are many of its citizens who hesitate to make such control a governmental activity. Certainly it is a radical departure from precedent, but that does not necessarily condemn it. This undoubtedly is a logical solution of our industrial problem, the opposition to it being based chiefly upon political considerations.[12]

The only alternative seems to be an extension of our present system of collective bargaining, aided by governmental regulation. Before we can decide against this latter method as unsuccessful in the past, it is necessary to give both labor and capital an equality of bargaining power.[13] And it may well be that we must examine with more care the claims of labor to a greater responsibility in the control and manage-

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[9] Even such a conservative as Judge Gary has stated, in his annual report to the stockholders of the United States Steel Corporation on April 18, 1921, that he looked upon "publicity, regulation, and reasonable control" of business through government agencies as a possible solution to our industrial problems. He suggested that this be done through non-partisan, non-sectarian commissions or departments, subject to review by the highest courts.

[10] Act of Aug. 10, 1917 (40 Stat. at L. 276).

[11] Governor Allen, of Kansas, speaking at Cambridge on April 25, 1921, has summed up the result of the Kansas Industrial Court as follows: "It has been in existence thirteen months, during which thirty cases have been brought before it, most of them by union labor. Of twenty-eight decrees uttered, twenty-seven were accepted by both employer and employed as entirely satisfactory. One case was appealed, that by a railroad company. Two strikes only have been declared within the life of the court, both small and each started by Alexander Howat, mine union leader in that district, and for each of which Howat was sentenced to serve a year in jail with additional fines."

See also Vance, *The Kansas Court of Industrial Relations and its Background* (1921) 30 YALE LAW JOURNAL, 456; COMMENTS, *supra* p. 75.

[12] This difficulty was well expressed in *Sharpless v. Mayor of Philadelphia*, (1853) 21 Pa. 147 by Black, C. J., who said: "The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief."

[13] See dissenting opinion of Justice Holmes in *Coppage v. Kansas* (1914) 236

ment of industry. Joint control by the parties directly engaged in the industry, rather than government control, seems more in accord with our traditional principles of government. The government must always be ready, however, to step in and operate any essential industry, such as the railroads or coal mines, if there is a complete breakdown. This system does not guarantee economic justice, but it may serve to make the parties realize that it is to their economic interest to settle their problems by mutual concessions.

If the courts attempt to regulate our industrial situation by mere deduction from legislative formulae, they may reach a result so out of harmony with community needs as to invite a violent overthrow and a seizure of legislative and judicial power by those who may be least able to use it wisely even for their own material welfare.[14] Our judiciary cannot hope to escape criticism, whatever may be their action; but either they must consciously assume the role of social law-makers, or they must leave the field open to private war between classes.

C. D. P.

POWER OF CONGRESS TO REGULATE STATE PRIMARIES

Widespread interest and much adverse criticism has been attracted by the decision of the Supreme Court in *Newberry v. United States* (1921, U. S.) 41 Sup. Ct. 469, reversing the District Court which had convicted Newberry and others of conspiring to violate the Corrupt Practices Act.[1] While the Court was unanimous in holding that the judgment should be reversed, it divided upon the question of the constitutionality of the act as applied to nominating primaries and conventions, holding by a bare majority that Congress has no power to regulate the expenditures of candidates for the House of Representatives or for the Senate in seeking a party nomination, but only when seeking "election" in the narrower sense. The remaining members of the court, the Chief Justice and Justices Pitney, Brandeis, and Clarke, denied that there was any constitutional infirmity in the act underlying the indictment, but voted for reversal on the ground that the case was improperly presented to the jury by the court below.

The constitutional provision involved is article I, section 4, which is as follows:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature

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U. S. 1, 26, 35 Sup. Ct. 240, 248, where he states that it is in the equality of position that liberty of contract begins.

[14] For a severe arraignment of the Massachusetts Court see (April 13, 1921) 26 THE NEW REPUBLIC, 171.

[1] Act of June 25, 1910 (36 Stat. at L. 822, 824) as amended by the Act of August 19, 1911 (37 Stat. at L. 25, 26).